IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

S.C. SUIT NO. 2489 OF 1983

TARABAI EBRAHIM SIAMWALA ..PLAINTIFF
V/S
MOHAMED AMIN HAJI ISMAIL & ORS. ..DEFENDANTS

A.S.I. LAIDY I/B LAIDY & CO. FOR PLAINTIFF.
PANKAJ KOWALI I/B PANCHAMATIA & CO. FOR DEFENDANT NOS. 1 & 4.

A.S.I. LAIDY I/B LAIDY & CO. FOR PLAINTIFF.
PANKAJ KOWALI I/B PANCHAMATIA & CO. FOR DEFENDANT NOS. 1 TO 4.

CORAM : S.K. SHAH, J.

JUDGMENT RESERVED ON 22ND NOVEMBER, 2006.

JUDGMENT PRONOUNCED ON 27TH NOVEMBER,2006.

ORAL JUDGMENT

1. This suit is filed for declaration of original plaintiff as owner and preliminary mortgage decree for redemption and for other reliefs.

2. The original plaintiff Husseinibhai Abdul Qayum Ranijiwala had filed the suit. It was alleged that the suit property was previously owned by Jadhavji Madhavji and others. The suit property is situate at Daulatnagar known as "Hansa Bhuvan", Borivali. On 14th July, 1967 the said property was sold by public auction in City Civil Court No. 5748 of 1965 filed by one Mohamedbhai Akberali Calcuttawala against the

previous owners. The original plaintiff Husseinibhai Abdul Qayum Ranijiwala being the highest bidder had purchased the suit property under order dated 16th October, 1967. The Registrar of City Civil Court had also issued a sale certificate dated 13th January, 1968 in favour of the original plaintiff Husseinibhai. The sale certificate was duly registered with the Sub Registrar of Bombay under Registration No. 174 of 1968. This court also issued certificate of sale warrant of possession dated 22nd February 1968 in the said suit and symbolic possession of the said property was delivered by the Sheriff to the plaintiff on or about 11th March, 1968.

3. When the plaintiff purchased the suit property it was subject to the Indenture of Transfer of Mortgage dated 21st October, 1964 in favour of the defendants for Rs. 29,031.25. As per the said Indenture of Transfer of Mortgage dated 19th September, 1962 executed by the previous owner in favour of Valchand Hinduja and others for Rs. 25,000/- at interest at

9% per annum. The plaintiff alleges that the defendants have failed and neglected to furnish to the original plaintiff the true particulars of the

Mortgage debt to enable the plaintiffs to redeem the mortgage. The original plaintiff filed suit for redemption of the mortgage alleging that the plaintiffs were ready and willing to pay to the defendants the principal amount due under the said Indenture of Transfer of Mortgage and also the amount of interest not exceeding the principal amount as provided in section 23 of the Bombay Money Lenders Act. Therefore the plaintiffs filed the suit.

4. It appears that the original plaintiff executed an Indenture of Second Mortgage dated 4th November, 1983 in favour of Tarabai Ebrahim Siamwala who is the present plaintiff and as such the present plaintiff is also entitled to redeem the said Mortgage in favour of the plaintiffs. The present plaintiff was therefore substituted.

5. The defendant Nos. 5 to 11 who are the heirs and legal representatives of the original plaintiff Husseinibhai have supported the claim of the

plaintiff by their written statement dated 28th March, 1998.

6. The defendant Nos. 1 to 4 have resisted the suit

by their written statement dated 6th September, 1998. While admitting the execution of the Indenture of Second Mortgage dated 4th November, 1983 in favour of the present plaintiff Tarabai they contend that no part of the mortgage debt has been repaid by the plaintiff and both the principal and the interest thereon accumulated and added to the mortgage debt as mentioned in the Indenture of Mortgage has remained unpaid. They contend that they are entitled to the interest as mentioned in the Indenture of Mortgage and denied the allegations of the plaintiff that the defendants are not entitled to the interest exceeding aggregate sum of the principal amount as per section 23 of the Bombay Money Lenders Act. They contend that the interest is being capitalised in accordance with the provisions of the said Indenture of Mortgage and forms part of the principal amount of the mortgage debt. On these contentions they claim dismissal of the suit.

7. In view of these rival pleadings the following issues are framed against which my findings are recorded as follows:

	ISSUES	FINDINGS
(1)	Whether the Plaintiffs prove that Husseinibhai Abdul Qayum Ranijiwala, the Original Plaintiff was the owner of the suit property?	In the affirmative.
(2)	Whether the plaintiffs prove that the said Husseinibhai Abdul Qayum Ranijiwala executed in her favour, the Indenture of second mortgage dated 4th November, 1983?	In the affirmative.
(3)	Whether the Plaintiffs prove that the amount of interest due to the mortgagees under the Indenture of of Transfer of Mortgage and further cheque dt. 21st October, 1964 cannot exceed the actual amount advanced by the Mortgagees to the Mortgagor under the said Indenture of Transfer of Mortgage and further charge in view of the provisions of Section 23 of the Bombay Money Lenders Act?	In the Negative
(4)	Whether the Defendants No.1 and 4 prove that they are the only mortgagees entitled to recover the mortgage debt due under the said Indenture of Transfer of Mortgage and further charge dated 21st October, 1964?	In the affirmative
(5)	Whether the payment of Rs. 58,062/00 by the Court Receiver to the Defendant Nos. 1 and 4 operates as	In the negative.

	the full discharge and satisfaction of the mortgage debt claimed by them under the Consent Order dated 7.1.1988?	
(6)	Whether the Plaintiff proves that she is entitled to a decree for redemption of the said first mortgage claimed by the Defendant Nos. 1 and 4?	In the negative

(7)	What relief the plaintiff is entitled to?	Suit is decreed in terms of prayers (a), (b) & (c)
(8)	What Order and Decree?	As per final order.

REASONS

Issue Nos. 1 and 2 :

8. **As submitted at the bar by the counsel on both sides there is no dispute that Hussenibhai Abdul Qayum Ranijiwala, original plaintiff was the owner of the suit property. It was also submitted that there is also no dispute as to the fact that the said** original plaintiff has executed in favour of the present plaintiff the Indenture of Second Mortgage dated 4th November, 1983. The relevant documents are produced on record. Therefore, I have no difficulty in answering those issues in the affirmative.

Issue Nos. 3, 4, 5 & 6 :

9. With regard to these issues the defendant No. 1 Mohammed Amin Haji Ismail himself has stated in para 15 of his evidence that the defendant Trust has not received any amount towards the mortgage claim except the sum of Rs. 59,062/- which was received in March 1998 from the Court Receiver, High Court, Bombay, as

per the order of the Court dated 7th January 1998 passed in the Notice of Motion No. 3439 of 1995 taken by the defendants in the suit. It is further stated that the said amount was received by the defendant No. 1 and 4 as surviving trustees of the trust on account and towards the mortgage claim of the defendants.

10. In the same paragraph the defendant's witness has stated that the defendants are entitled to claim a sum of Rs. 31,04,748.11 upto 31st March 2006 with further interest as per the terms of the said mortgage till payment thereof from the plaintiff. In support he has produced the statement showing the interest calculation at D-14.

11. Thus the dispute is only with regard to the amount of interest. It is vehemently submitted on

behalf of the plaintiff that the defendants are not entitled to any amount beyond the principal sum as per the provisions of Section 23 of The Bombay Money Lenders Act. As against this the learned counsel for the defendants submits that the provisions of Sec. 23 of the Bombay Money Lenders Act are not applicable. The provisions of Sec. 23 of Bombay Money Lenders Act are as under :

Sec. 23. Notwithstanding anything contained in any agreement or any law for the time being in force, no Court shall in respect of any loan whether advanced before or after the the date on which this Act comes into force, decree, on account of interest, a sum greater than the principal of the loan due on the date of the decree.

12. However, as per the contention of the learned counsel for the defendants the provisions of section 23 applies only in respect of the loan and the loan which was advanced by the defendants does not fall under the definition of loan given in Sec. 2(9) of the Bombay Money Lenders Act. The relevant provisions are as under :

"Sec. 2(9) "loan" means an advance at interest whether of money or in kind but does not include-

(a) a deposit of money or other property in a Government Post Office, Bank or in any other bank or in a company or with a Co-operative society;

(b) a loan to, or by, or a deposit with any society

or association registered under the Socities Registration Act, 1860, or any other enactment relating to a public, religious or charitable object."

13. As per this definition of loan, the loan is advanced at interest but does not include, as per clause (b) of sub section (9) of Sec. 2 a loan to, or by, or a deposit with any society or association registered under the Socities Registration Act, 1860, or any other enactment relating to a public, religious or charitable object. The contention raised on behalf of the defendants is that it is undisputed that the advance made by the defendants was by the defendant No. 4 Trust i.e. Makki A.

Darvesh, trustees of a family Trust known as Haji Ismail Haji Ahmed Family Trust. It is not in dispute that the defendant No. 4 Trust is registered under the Public Trust Act.

14. It is vehemently submitted on behalf of the plaintiff that clause (b) of sub section (9) of section 2 of the said Act applies only to an Association registered under the Socities Registration Act or any enactment relating to a

public, religious or charitable object. It is submitted that it is a family Trust and therefore it is not an association and therefore it will have no application to the defendant’s case. However, this submission is not accepted. It is admitted position that though it is a family Trust it is a Trust registered under the Bombay Money Lenders Act. It is run by the trustees which keep on changing and the trustees are registered with the Charity Commissioner. Thus, it is an association of the trustees who are the trustees of the family, who are the trustees of the Trust which is registered under the provisions of Bombay Public Trust Act and therefore the advance given by this Trust would not

fall under the definition of loan given in sub section (9) of section 2 of the Bombay Money Lenders Act.

15. Sec. 23 of the Bombay Money Lenders Act applies to any loan whether advance before or after the date and such loan would be governed by the definition of loan. Thus it would not be applicable for advance made by the Trust. The provisions of section 23 of the Act also will not be attracted.

16. In this regard learned counsel for the plaintiff submits that the rule of damduppat is applicable to all the mortgage. For making this submission he has relied on the decision of the Apex Court rendered in the case of Mhadagonda Ramgonda Patil v. Shripal Balwant Rajnade reported in 1988 Bombay Law Reporter 202, the decision of this court rendered in the case of Govind Dhondo Tamboli v. Mannabai Govind Dalwale reported in 1954 BLR Vol.LVI 470 and the decision of this court in the case of Bansilal Ramgopal Phattad v. Harischandra Tatya reported in 1952 BLR Vol. LV 444. However, in all these decisions the mortgage money was covered under the definition of loan as given in the Bombay Money Lenders Act. However, in

the present case as discussed above the money advanced is not covered under the definition of loan as money was advanced by the Trust. As such these decisions will have no application to the facts of this case.

17. Consequently the payment of Rs. 58,062/- made to the defendants as per the order of the court as stated above would not occur as willful discharge or satisfaction of the mortgage debt. Consequently the plaintiff is not entitled to a decree for redemption as claimed by them in the suit unless they pay the

amount of interest due under the Second Indenture of Mortgage executed in favour of the plaintiff. Thus the issue No. 3 and 5 will have to be answered in the negative and issue No. 4 in the affirmative.

18. As such the suit is decreed in terms of prayer clauses (a),(b) subject to payment of interest by the plaintiff to the defendants as per the said Indenture of Transfer of Mortgage dated 21st October, 1964 and (c). The preliminary decree be drawn accordingly.

(S.K. SHAH, J.)